Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1903

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

Charles F. Moses
MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court erred in failing to enforce the plea bargain between David Mervin Hoffman and the United States of America, and accordingly, failing to dismiss the Order of contempt?

2. Whether the Court erred in finding that the grant of immunity and the reach of the Fifth Amendment provided sufficient protection to David Mervin Hoffman when a foreign country was involved?

3. Whether the Court erred in finding that subsequent incarceration for the Order of contempt is "dead time" for a person presently confined to a federal prison?

TABLE OF CONTENTS

Questions Presented for Review ii

Table of Cases & Authorities iii

Report of Opinions Below 2

Jurisdiction 4

Constitutional Provisions and Statutes 4

Statement of the Case 5

A. Statement of the Facts 5

B. Jurisdiction in Court of of First Instance 10

Argument 10

Issue #1 10

Issue #2 16

Issue #3 26

Conclusion 33

Filing and Service Verification 34

TABLE OF CASES & AUTHORITIES CITED

Cases Cited:

Application of U.S. Senate Permanent Subcommittee on Investigation, 655 F.2d 1232 26

Federal Reserve Board v. Dimension Financial, 474 U.S. ___, 88 L.Ed.2d 691, 106 S.Ct. ___ 28

Her Majesty, Queen in Right v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979) 21,22

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) 16

In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979) 32,33

In re Garmon, 572 F.2d 1373 (Calif.) 26

Kastigar v. United States, 406 U.S. 442, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972) 19

Martin v. United States, 517 F.2d 906 26

Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed. 678, 84 S.Ct. 1594 (1964) 18

New Jersey v. Portash, 440 U.S. 450, 59 L.Ed.2d 501, 99 S.Ct. 1202 (1979) 18

Santobello v. New York,
404 U.S. 251, 30 L.Ed.2d 427
92 S.Ct. 495 (1971) 14

Stonehill v. United States,
485 F.2d 738
(9th Cir. 1968) 21,24

T.V.A. v. Hill,
437 U.S. 153, 57 L.Ed.2d 117,
98 S.Ct. 2279 (1978) 28

United States v. Carrillo,
709 F.2d 35
(9th Cir. 1983) 16

United States v. Chacon,
663 F.2d 495 28

United States v. Garcia,
519 F.2d 1343
(9th Cir. 1975) 15

United States v. Kramer,
781 F.2d 1380
(9th Cir. 1986) 16

United States v. Krasn,
614 F.2d 1229
(9th Cir, 1980) 16

United States v. LeMieux,
597 F.2d 1166
(9th Cir. 1979) 20

United States v. Maher,
645 F.2d 780
(9th Cir. 1981) 20,24

United States v. Rojas-Contreraz,
474 U.S. ___, 88 L.Ed.2d 537,
106 S.Ct. ___ 27

United States v. Rose,
570 F.2d 1358
(9th Cir. 1978) 20,24

United States v. Sutton,
794 F.2d 1415
(9th Cir. 1986) 16

United States v. Under-Seal,
794 F.2d 920
(4th Cir. 1986) 20,23,25

Zicarelli v. Investigation Commission,
406 U.S. 472, 32 L.Ed.2d 234,
92 S.Ct. 1670 25

Other Authorities Cited:

United States Constitution,
Fifth Amendment 4

United States Constitution,
Ninth Amendment 4

United States Constitution,
Tenth Amendment 4

18 U.S.C. Sec. 3568 5,26

28 U.S.C. Sec. 1826 5

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

Charles F. Moses
MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

COUNSEL FOR PETITIONER

Comes now, the Petitioner, David Mervin Hoffman, and respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

The United States District Court for the District of Montana, Great Falls Division, issued its Order In Re Contempt on January 26, 1987. In the Order, the Court first made findings of fact, and based upon those findings of fact, concluded as a matter of law that the reasons given for Mr. Hoffman's refusal to testify were not just cause, and further that the plea bargain agreement between Mr. Hoffman and the United States indicated that Mr. Hoffman was aware that any plea bargain was not binding upon the District Court. From the findings of fact and conclusions of law, the Court ordered that Mr. Hoffman be found in contempt; that Mr. Hoffman be incarcerated until such time as he could appear before the grand jury and answer such questions as would be propounded of him; and further that the computation of time spent in custody pursuant to this Order and its effect upon Mr. Hoffman's prison sentence

shall be computated by the Bureau of Prisons.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court in an unpublished Memorandum dated February 27, 1987. The Court held that it was not reasonable for Mr. Hoffman to assume as part of the plea agreement that the government had impliedly promised that he would not be called to testify before the grand jury. Further, the Court held that Mr. Hoffman did not have just cause to refuse to testify on the grounds that his testimony might incriminate him under the laws of Canada. Finally, the Court held that a civil contempt sentence may be imposed upon a witness who is serving a criminal sentence, thereby suspending service of the criminal sentence during the period of the contempt confinement.

JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit was filed on February 27, 1987. This Petition for Certiorari, which is mailed on April 28, 1987, is timely as required by Supreme Court Rule 20.1.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the Land or Naval Forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution, Ninth Amendment.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Tenth Amendment.

The powers not delegated to the United States by

the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

18 U.S.C. Sec. 3568.

(The pertinent text set forth in the Appendix.)

28 U.S.C. Sec. 1826.

(The pertinent text set forth in the Appendix.)

STATEMENT OF THE CASE

A. Statement of the Facts

The Petitioner, David Mervin Hoffman, was charged by an indictment in the District of Montana, Billings Division, under number CR 86-1-BLG with the crime of possession with intent to distribute marijuana, a Schedule I controlled substance, in violation of 21 U.S.C.A. 841(a)(1). At that time, he was represented by Christopher P. Thimsen, Esq., of Billings, Montana, and during the course of said proceedings, plea bargain discussions were entered into between the United States Attorney and the attorney for the defendant. On February 19, 1986, the United States Attorney called by phone to the attorney for the defendant and advised that if Deane (David Mervin Hoffman) pleads guilty

there would be no recommendation with respect to sentencing, but that any time imposed would be concurrent with the Canadian sentence. As an alternative or option, he was advised that if he wanted to testify against others, then the government may make a recommendation for less time. This discussion was reduced to writing by memorandum at the time the discussions were held by Mr. Thimsen as follows:

> "2-19-86.
> "Seykora called - if Deane pleads guilty - no recommendation re sentence - but any time will be concurrent w/Canadian sentence.
>
> "If he wants to rat then, they may make a recommendation for less time.
> CPT"

Subsequently, the defendant elected the first alternative to plead guilty without recommendation, with the clear understanding that he would not, under those circumstances, be required to testify against others. This formed the basis, and the inducement, upon which the defendant entered a plea on May 9, 1986.

In addition, the defendant, David Mervin Hoffman, to insure that he would have no further problems in the United States, advised the Court that he wished to serve

his sentence in Canada and neither the Court nor the United States had any objection to this provision and it was included in the Judgment and Commitment Order.

Thereafter, the defendant was required to appear before the grand jury at Great Falls, Montana, on or about June 17, 1986 (these grand jury proceedings were handled by the same United States Attorney that entered into the agreement with the defense counsel so that he was fully knowledgeable), at which time he refused to testify upon the grounds that it might tend to incriminate him, particularly for the reasons that the protection was not as broad as that provided by the Fifth Amendment because this involved a case or cases now pending in Canada and the order would not have extra-territorial effect. The scope and breadth of the Fifth Amendment as it applies to foreign jurisdictions was a subject of doubt, discussion, and controversy. As a result of these discussions with the United States Attorney, Mr. Hoffman did not actually appear before the grand jury.

Thereafter, a habeas corpus proceeding was instituted to require the defendant to appear before the

grand jury at Great Falls, Montana, on November 18, 1986, and there to give testimony on behalf of the United States government. The subpoena was duly issued and delivered to the defendant, and a copy of the writ of habeas corpus was served. In addition, Mr. Hoffman was served with a letter dated November 18, 1986, executed by Jeffrey D. Thomas as agent for the Attorney General of the Dominion of Canada advising that the Dominion of Canada "does not intend to prosecute for any crimes upon which prosecution could be based as a result of your testimony before the United States grand jury".

The defendant appeared before the grand jury at Great Falls, Montana, on November 18, 1986, at which time in response to questions asked him he respectfully declined to testify at that time. Mr. Hoffman set forth his reasons for not testifying, and they were, in part, as follows:

1. No legitimate purpose has been given to compel my testimony under a grant of immunity.

2. Such information as obtained may be used against me in proceedings outside the continental

United States and in a foreign jurisdiction.

3. There is a conflict of laws as to whether the Fifth Amendment does or does not protect against self-incrimination under foreign law.

4. There is a joint participation between the Canadian government and the United States government as to these proceedings which may affect any grant of immunity.

5. Comity in criminal cases between nations is simply not permitted, and the Court would have to determine whether the law is sufficient to protect the witness' interest.

6. There was danger to himself and his family which cannot be minimized.

7. Finally, the basis of the judgment of conviction and my entering into a plea bargain agreement with the United States government was implicitly that I would not have to testify against others and could go to Canada without further problems in the United States. This was a basic and material part of my decision to enter into a plea and should be respected by the Court, and the United States government should be obligated to

carry out this agreement.

Based upon the refusal of the defendant to testify before the grand jury, he was brought before the Court for the purpose of holding him in contempt. The Court granted time within which the government and defense counsel could present their position on these issues and set the matter for hearing on December 17, 1986, for further proceedings. Despite a motion to quash, the Court held the defendant in contempt by its Order dated January 26, 1987, on which this appeal is taken.

B. Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the court of first instance, the United States District Court for the District of Montana, Great Falls Division, is 28 U.S.C. Sec. 1826.

ARGUMENT

Issue #1. Whether the Court erred in failing to enforce the plea bargain agreement between David Mervin Hoffman and the United States of America, and accordingly, failing to dismiss the Order of contempt?

Central to the decision of Mr. Hoffman to refuse to testify is the plea bargain agreement that was entered into between the parties or understood by the parties when he entered his plea before Judge Battin's Court on May 9, 1986. He was given an alternative: If he pleads guilty, there will be no recommendation as to sentence; if he wants to testify as to others, then they may make a recommendation for less time in his sentence. Mr. Hoffman did not wish to testify and wanted to return to Canada, being a Canadian citizen, and thus selected the former choice for which he received the maximum sentence as provided by law. In this respect, it was a heavy price to pay for not testifying against others, but it was a decision made and understood by all parties.

The government, however, after securing the maximum sentence under his agreement to plead without testifying as to others, thereafter subpoenaed him to appear before a grand jury to in fact testify under a grant of immunity having to do with cases in the United States and in the foreign jurisdiction of Canada. This, of course, is contrary to the understanding and the

agreement that Mr. Hoffman had with the government. It is obvious fact that if he knew that he would be required to testify in any event, then, of course, he would simply accept the latter alternative and receive a lesser sentence. In our view, the government cannot have it both ways. We respectfully submit that "a deal is a deal", and that the government and all parties must abide by and carry out the literal terms of the agreement, and this is supportable by law.

A quiet word should be stated with respect to the factual circumstances in this case. They can be detailed as follows:

1. The testimony of Mr. Hoffman is clear and concise on this issue, and there is no contrary evidence as to his understanding of the agreement with the United States Attorney. (In this respect, it is not a disputed fact case.)

2. There is a memorandum that was submitted in evidence in this case which supports Mr. Hoffman's understanding of the options available to him. (This has been produced in the statement of facts and appears in Appendix.)

3. The affidavit of Mr. Thimsen, the attorney, confirms.

4. The United States Attorney who was involved in this agreement or understanding, did not assert facts to the contrary. (It was interesting to notice that he used the word "rat" in his summation in the same way as it appeared in the note by Mr. Thimsen. See Page 34 of Transcript of Proceedings of December 17, 1986, in Appendix.)

5. The Judge found that there was in fact an option that the defendant had. In short, he can testify and receive a lesser sentence or recommendation, or not testify and take his chances for a maximum sentence. (Which he received.)

6. It is almost conclusive and uncontradicted that the defendant wanted to "get out from under the clutches of the United States government", and this appears in the Judgment and Commitment in the drug case, for which he pleaded guilty. Obviously he wanted to insure that the government would keep its bargain and not require him to testify.

7. The Judge was under the impression that the

determination of whether the Court accepted the agreement or not was controlling. This is legal error in our view because the applicable law is that it is the agreement between the parties that is to be enforced and which provides the inducement for the entry of plea, and not the Court's decision as to whether he will consider it or not.

One comment may be appropriate here. This is an unusual case in that the defendant is seeking simply to enforce the agreement and not to set aside the plea. He carried out his part of the bargain by subjecting himself to maximum punishment for the crime to which he pleaded guilty and he must suffer the consequences. He is not seeking to set aside the plea; simply to enforce the agreement.

The leading case, of course, is Santobello v. New York, 404 U.S. 251, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971). This case, of course, is well known to the Court, but statements made in that case have relevance.

1. The Court in that case advised defense counsel that the statements of the prosecutor did not influence him in any way as to the sentence to be imposed and

that "it doesn't make a particle of difference what the District Attorney says he will do or what he will not do". In other words, the decision of the Court, even if he declares that he is not bound by it as in this case or that it is not relevant as in the Santobello case, the issue is simply whether the agreement should be enforced.

2. The Court stated that the disposition of criminal charges between the prosecutor and the accused is an essential component of the administration of justice and is to be encouraged; and where a guilty plea rests in significant degree on an understanding between the parties so that it could be said to be an inducement for an entry of plea the agreement could be enforced or other appropriate relief given. In other words, it depends upon the understanding of the parties, which would influence the defendant in entering a plea. In the case at bar, these circumstances are uncontradicted.

This case, of course, has found approval everywhere, but specifically, we direct the Court's attention to the following cases. United States v. Garcia, 519 F.2d 1343 (9th Cir. 1975); United States v.

Carrillo, 709 F.2d 35 (9th Cir. 1983); United States v. Krasn, 614 F.2d 1229 (9th Cir. 1980); United States v. Sutton, 794 F.2d 1415 (9th Cir. 1986); Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986); United States v. Kamer, 781 F.2d 1380 (9th Cir. 1986).

Conclusion as to Issue #1

The factual circumstances with respect to understanding of the parties is not challenged here. The testimony is clear and unrefuted as to what the circumstances were. The defendant could "rat" on others and have the prospect of a reduced sentence or could "keep his mouth shut" and not testify and subject himself to the maximum sentence (which he received). This inducement not to testify and take his medicine was clearly in the minds of all concerned. If he had the slightest notion that the government would thereafter "compel" him to testify, there would be no reason for him to subject himself to the maximum sentence.

Issue #2. Whether the Court erred in finding that the grant of immunity and the reach of the Fifth Amendment provided sufficient protection to David

Mervin Hoffman when a foreign country is involved.

For many years, the right under the Fifth Amendment to the United States Constitution not to be a witness against yourself and that you could "remain mute" was the law of the land. The Fifth Amendment and its protection was understandable and very clear. There was, however, the right to waive the benefits of the Fifth Amendment if the waiver was informed and intelligent and knowingly made. Thus, a witness could contract with the prosecution that he would waive his Fifth Amendment rights if he would not be prosecuted for the crime for which he might incriminate himself. This was a fully accepted principle.

Subsequently, even without regard to "the balancing test", the Supreme Court ruled that the government must have the power to compel testimony to secure information necessary for effective law enforcement. If there was a modification or reduction in the effectiveness of the Fifth Amendment, a "watering down" of the constitutional rights, if you will, still the need for effective law enforcement carried the day. It is clear that if this position was carried to its logical conclusion,

then all constitutional rights are simply subordinate to effective law enforcement. In this respect, the inalienable rights set forth in the Bill of Rights became subject to overriding government control. This ruling was set forth in Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964).

Thereafter, the usual rule in the field of immunity was that where a person was now compelled to give up his Fifth Amendment rights under a grant of governmental immunity, he could not be prosecuted for any conduct about which he had testified. This was the ordinary "transactional immunity" which has been set forth in New Jersey v. Portash, 440 U.S. 450, 59 L.Ed.2d 501, 99 S.Ct. 1292 (1979). It became apparent, however, that prosecutors were reluctant to grant such extensive immunity to a witness. But this was not appropriate for the prosecution, and the Organized Crime Control Act of 1970 was passed in which Congress sought to make the grant of immunity more useful for law enforcement. The purpose was to give to the prosecution the necessary legal tools to strengthen the evidence gathering process and to insure that the evidence will then be

available and addressable at trial (116 Cong.Rec. 35200, Statement of Rep. St. Germain). Obviously, Congress now interposed its rules by repealing the authority for transactional immunity and providing for the less comprehensive use immunity and derivative use immunity authorized by Sec. 6002 and 6003. The need for better law enforcement tools and the denigration of the Fifth Amendment was apparent, and this new statute was upheld in Kastigar v. United States, 406 U.S. 442, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972). In that respect, the rationalization was and is that any grant of immunity must be coextensive with the privilege and that the statute provides a "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom". This bring us, of course, to the present day and the use of the immunity statutes.

Adding to the confusion as to the application, scope and extent of the use immunity statute, we now have the intervention of possible proceedings in a foreign jurisdiction and that is the issue, at long last, that is presented here.

Courts have attempted to resolve these issues so the testimony could be available in a foreign jurisdiction against a defendant where testimony before the grand jury would not be available and his rights would be fully protected. One of the means to try and accomplish this is the suggestion that the Federal Rules of Criminal Procedure, Rule 6(e), pre-served the secrecy of the grand jury and there was no real and substantial danger of foreign prosecution. There is a conflict in the Circuits on this issue. See United States v. Lemieux, 597 F.2d 1166 (9th Cir. 1979), and United States v. Under-Seal, 794 F.2d 920 (4th Cir. 1986). It is precisely this conflict among the Circuits that must be resolved, and which forms the primary basis upon which this Petition is submitted.

In the case at bar, there seems to be no argument or issue that the Fifth Amendment and the protections accorded under that constitutional provision extends no further than the boundaries of the United States and is not binding upon the Dominion of Canada. See, in this respect, United States v. Maher, 645 F.2d 780 (9th Cir. 1981); United States v. Rose, 570 F.2d 1358 (9th Cir.

1978); Stonehill v. United States, 485 F.2d 738 (9th Cir. 1968). There is clearly no protection, and this should be established fact so that the scope and reach of the Fifth Amendment is not consistent with the purposes of the law in securing such testimony, that being a necessary requirement.

The issue is also advanced as to how the United States Court in dealing with this issue can determine or decide whether there is sufficient protection in Canada for the defendant and whether the reach of the Fifth Amendment will be accorded in Canada. In Her Majesty, Queen in Right v. Gilberton, 597 F.2d 1161 (9th Cir. 1979), the United States District Court would not accept a judgment from a foreign country under any sort of full faith and credit considerations. In that case, the Court said:

> "Generally, judgments from a foreign country are recognized by the courts of this country when the general principles of comity are satisfied. Two often-stated exceptions to comity occur when the judgment is based upon either the tax (the revenue rule) or penal laws of the foreign country. (Citing cases)."

That case additionally says:

> "This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass it neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

What we glean from this case is the following:

1. The United States Courts cannot recognize the force and effect of the criminal law in a foreign jurisdiction under comity.

2. If judgments cannot be accepted, then any proceedings before judgment would have ever a lesser role of acceptance in the United States of those foreign proceedings.

3. To pass upon or to rule upon the provisions for the public order of another state should be beyond the

powers of the Court. This is exactly what the Court is being called upon to do in the instant case: to determine the extent and scope of the Canadian procedures and whether in the Court's view it would adequately protect the defendant here.

This, it is submitted, extends the United States law applicable only in the United States far beyond that contemplated by Congress or that contemplated by the scope and reach of the Fifth Amendment as understood when compelled testimony was required by Congress.

One final issue requires comment. The cooperation and joint venture between the federal government and the Canadian authorities is apparent. Representatives of Her Majesty's government have been present to testify. We know of our own knowledge of communications by the United States Attorney with attorneys for the Canadian government in connection with this case, and it is obvious fact that exporting from the United States or importing from the United States are so inextricably bound up in factual circumstances that they cannot be separated as a matter of fact. See United States v. Under-Seal, 794 F.2d 920 (4th Cir. 1986);

United States v. Maher, cited supra, United States v. Rose, cited supra; and Stonehill v. United States, cited supra.

Therefore, if the United States government cannot give and is not capable of giving the full scope and reach of the Fifth Amendment to a witness, he should not be obligated to testify. In this respect, the letter from the Canadian attorney says they will not prosecute for any binding action or information received from his testimony before a United States grand jury but that does not mean that he will not be required to testify in the United States or in Canada, and that when he does in fact testify, that that testimony can be used against him in either sovereign country.

Conclusion as to Issue #2

With respect to the law of immunity, there are certain issues for consideration by the Court which are seriously proffered.

1. The act of Congress in granting immunity cannot diminish or "water down" the benefits of our Constitution under the Fifth Amendment. We simply cannot have a "legislative equivalence" rule where Congress

states this is as good as the protection afforded by the Constitution. At least that is the way it has been since 1803.

2. The problem is to determine whether the scope and reach of the Fifth Amendment is satisfied where foreign jurisdictions are involved. If, as they say in Zicarelli v. Investigation Commission, 406 U.S. 472, 32 L.Ed.2d 234, 92 S.Ct. 1670, there is no real or substantial fear that the defendant would be exposed to prosecution outside of the United States, the immunity applies.

3. A joint venture between Canada and the United States is apparent from the testimony in this case and from the documents that have been submitted. As shown in the cases cited to the Court, this changes the rule as to immunity where there is a joint undertaking.

4. United States v. Under-Seal also points out that the Federal Rules of Criminal Procedure 6(e) does not satisfactorily solve the problem of secrecy.

We think consideration of these issues will demonstrate the merit of our position and that good cause is shown for our views.

Issue #3. Whether the Court erred in finding that subsequent incarceration for the Order of contempt is "dead time" for a person presently confined to a federal prison?

The cases seem to hold that incarceration as a result of civil contempt is in fact dead time and "interrupts" the actual sentence being served. The cases in support of this proposition are as follows: Application of U.S. Senate Permanent Subcommittee on Investigation, 655 F.2d 1232; In re Garmon, 572 F.2d 1373 (Calif.); Martin v. United States, 517 F.2d 906; United States v. Chacon, 663 F.2d 495.

The specific statutory language reads as follows:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for srvice of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed . . . No sentence shall prescribe any other method of computing the term." (18 U.S.C.A. 3568) (Emphasis supplied.)

It is, however, a matter of statutory construction to

determine whether a sentence imposed in a criminal case can be interrupted for any reason without a statutory exception or without reserving the right for another court in a civil proceedings to change the sentence in a criminal case. We assume that in a civil case there is no jurisdiction to affect or tamper with a sentence imposed in a different case and in a different jurisdiction.

The argument that has been presented is simply that there would be no way to "coerce" an incarcerated defendant and force him to testify, the Fifth Amendment notwithstanding. Upon this basis, an exception is "breathed" into the law.

We assume that matters of statutory construction are equally applied both as it concerns the government and as it concerns any "criminal" seeking to avail himself of the same standards of statutory construction. It is interesting to read United States v. Rojas-Contreraz, 474 U.S. ___, 88 L.Ed.2d 537, 106 S.Ct. ___, holding that under the plain language of the statute the restarting of the 30 day pretrial prepar-ation period under a superseding indictment is not required. Of

substantial interest, furthermore, is T.V.A. v. Hill, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978). This was the "snail darter" case where the Court was confronted with the explicit language of a statute that, in application, produced a curious result. It was noted that nothing prohibited Congress from passing unwise legislation, and we have upheld the statute as Congress has written it. Granting relief from a statutory provision is a function of the legis-lative branch of government and could not have been tailored by the Courts, or so it was said in that case.

This was recently reaffirmed in Federal Reserve Board v. Dimension Financial, 474 U.S. ____, 88 L.Ed.2d 691, 106 S.Ct. _____. There the Court observed the "plain purpose of the legislation". It quotes with approval T.V.A. v. Hill. We also have a rule of construction that the Court may not add to a statute or may not subtract or omit provisions from the statutory language. There is no cause to grant exceptions in the law because it is a legislative function. The Courts are courts of last resort, of course, but are not designed to make law.

Conclusion as to Issue #3

It is an interesting commentary on our law that where the statute is explicit as to the sentence of imprisonment of any person that by judicial construction a civil contempt statute interrupts the sentence and is contrary to the statutory provisions. It is interesting to observe that this is simply a "rule of necessity" and that we add to the statute an exception which does not appear in the Code. If Congress wanted to make an exception, why didn't they say so in clear and precise terms? However, Congress did not. The reality of this "statutory construction" is to simply coerce a person into testifying and that is all it is: coercion, and that is the reality.

THE COURT'S DECISION

On February 27, 1987, the Ninth Circuit Court of Appeals affirmed the decision of the District Court of Montana. We address our concern with that decision in this section of the petition.

The Court held:

> "When a guilty plea rests in any significant degree upon a promise or agreement of the Government such promise must be fulfilled.

United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984)."

We agree. The testimony is simply uncontradicted that whether he would testify against others was a material and significant part of his decision to plead in this case and subject himself to the maximum punishment. This can scarcely be denied.

The Court held:

"In determining whether a plea agreement has been broken, the Court must look to what was reasonably understood by the defendant when he entered his plea."

We agree. The evidence is uncontradicted that he understood he would not be required to testify against others or give any statement to that effect. He says so, his attorney confirms, and the United States Attorney registered no denial. This was not the fact that, we submit, was the state of the clear record.

The Court, however, held:

"It was not reasonable for Hoffman to assume that the Government had impliedly promised that he would not be called to testify before the grand jury. The record reveals no representations by the Government that Hoffman would not be subpoenaed to testify."

We disagree. The record reveals:

1. The understanding of Hoffman and his attorney.

2. That in the judgment he would be permitted to return to Canada as requested by Hoffman.

3. The same United States Attorney handled the agreement and the grand jury — no mistake here.

4. It would be illogical to enter a plea, as he did, with the understanding he would, thereafter, have to testify anyway. Why not take the lesser sentence?

5. Reliance on the slender reed in the decision that a difference in the forum is significant is misplaced. The deal was, "If you want to keep your mouth shut, O.K., but the maximum sentence awaits you." That is what he accepted. It is a matter of common sense. "Furthermore, we agree to send you to Canada." What more is required as to what the defendant and his attorney understood?

6. If he had been informed he would have to testify <u>anyway</u>, it would have affected his decision. That, too, is common sense. In this light, it was not an informed and intelligent decision as seems to be required, if there was an unspoken caveat that the government would thereafter rely on the grand jury. It

is not fair.

We believe that part of the decision to be erroneous.

The Court further held the possibility of the use of the grand jury testimony by a foreign jurisdiction does not violate a witness' privilege against self-incrimination.

Hufstedler in his concurring opinion in In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979) is favorable to our view expressed in this petition.

It is the law of the forum which determines the scope and reach of constitutional protections. It is the cooperative effort (joint) of the United States and Canada which distinguishes this case. It is the Federal Rule of Criminal Procedure 6(e) which cannot fore-close the imparting of information that is relevant.

In sum, the Fifth Amendment is an idle and useless right that does not protect a prosecution or testimony if the witness is required to testify in Canada in an open forum. It jeopardizes future prosecutions in the United States for which there is, apparently, no protection.

This is especially true in this case where export-import issues are involved and inextricably bound together.

We submit the decision does not, by its ruling, protect Hoffman and his constitutional rights. It is not a remote possibility that he will not or will go to Canada. It is actual fact. (Compare Lemieux and Mexico as to factual distinctions.)

As to the Court's ruling on "dead time", our petition suggests Supreme Court of the United States cases, which do not permit "judicial legislation". We take the statutes as we find them and do not add or interpret that which does not appear. This is a legislative function.

CONCLUSION

For the reasons stated and the authorities cited, petitioner prays that this Court grant this petition for a writ of certiorari.

DATED this 28th day of April, 1987.

MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

By Charles F. Moses
Charles F. Moses
ATTORNEY FOR PETITIONER

FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHARLES F. MOSES, of legal age, being first duly sworn, on his oath, deposes and says that he is the attorney for petitioner herein, and that he personally has deposited 40 copies of this petition in the United States Post Office in Billings, Montana, first class postage prepaid and affixed, and properly addressed to the Clerk of this Court, on the 28th day of April, 1987, which is timely as within 60 days of this date of the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit dated February 27, 1987.

Affiant further states that this petition was at such time and place served by mail on the respondent

United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies thereof to:

Byron H. Dunbar
United States Attorney
Federal Building
Billings, MT 59101
Attention James E. Seykora
Assistant United States Attorney

Charles F. Moses

Charles F. Moses

Subscribed and sworn to before me this 28th day of April, 1987.

Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires 4/9/1988

APPENDIX

Memorandum of Ninth Circuit Court of Appeals - February 27, 1987 ..... A

Order in re Contempt - January 26, 1987 ..... B

Defendant's Exhibit #1 - Indictment C

Defendant's Exhibit #2 - Note of Attorney Thimsen ..... D

Defendant's Exhibit #3 - Affidavit of Attorney Thimsen ..... E

Defendant's Exhibit #4 - Judgment dated May 12, 1986 ..... F

Transcript of Proceedings of April 4, 1986, pages 5, 6, 7 ..... G

Transcript of Proceedings of December 17, 1986, pages 20-23 ..... H

Transcript of Proceedings of December 17, 1986, page 34 I

Transcript of Proceedings of December 17, 1986, pages 38, 39 ..... J

18 U.S.C. Sec. 3568 ..... K

28 U.S.C. Sec. 1826 L

NOT FOR PUBLICATION

FILED Feb 27, 1987
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDING DAVID MERVIN HOFFMAN, Witness-Appellant v. UNITED STATES OF AMERICA, Appellee.	)	No. 87-3002 DC# GJ-1-GF Montana MEMORANDUM*

Submitted February 24, 1987**
Decided February 27, 1987

Appeal from the United States District Court
For the District of Montana
Hon. Paul G. Hatfield, U.S. District Judge, Presiding

Before TANG, PREGERSON and O'SCANNLAIN, Circuit Judges

Hoffman appeals the district court's judgment holding him in civil contempt for refusing to testify before the grand jury.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 3(f).

A grand jury witness may be held in civil contempt if he refuses without just cause to testify. 28 U.S.C. Sec. 1826. When a guilty plea rests in any significant degree upon a promise or agreement of the government, such promise must be fulfilled. United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984). In determining whether a plea agreement has been broken, the court must look to what was reasonably understood by the defendant when he entered his guilty plea. Id.

It was not reasonable for Hoffman to assume that the government had impliedly promised that he would not be called to testify before the grand jury. The record reveals no representations by the government that Hoffman would not be subpoenaed to testify. The district court correctly concluded that the plea agreement did not preclude the government from subpoenaing Hoffman to testify.

Nor does Hoffman have just cause to refuse to testify on the ground that his testimony might incriminate him under the laws of Canada. This court has held that the possibility of the use of grand jury testimony by a foreign jurisdiction does not violate a witness' privilege

against self-incrimination. In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166, 1167 (9th Cir. 1979); In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974).

Finally, this court has held that a civil contempt sentence may be imposed upon a witness who is serving a criminal sentence, thereby suspending service of the criminal sentence during the period of the contempt confinement. In re Grand Jury Proceedings (Garmon), 572 F.2d 1373, 1376 (9th Cir. 1978).

AFFIRMED.

APPENDIX A

JAMES E. SEYKORA
Assistant U.S. Attorney
P. O. Box 1478
Billings, MT 59103
Telephone: 657-6101

Attorney for United States

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

IN RE GRAND JURY PROCEEDING REGARDING COMPELLED TESTIMONY OF DAVID MERVIN HOFFMAN

ORDER IN RE CONTEMPT

This matter came on regularly for a hearing pursuant to this Court's previous order and pursuant to motion. The Court, first of all, finds the following facts:

1. David Mervin Hoffman was subpoenaed to appear and testify before the Great Falls Grand Jury of June 16, 1986, in Great Falls, Montana.

2. That Mr. Hoffman did not appear before the Grand Jury as his attorney, Charles Moses and the government attorney had discussions regarding request for immunity by Canada.

3. Mr. Hoffman was once again subpoenaed to

appear before the Great Falls Grand Jury on November 18, 1986.

4. Mr. Hoffman was served with a copy of his subpoena to testify before the Grand Jury.

5. Mr. Hoffman was given a copy of the Writ of Habeus ad Testificadum and was asked to testify.

6. Mr. Hoffman refused to testify and Mr. Hoffman was then given and read a copy of this Court's compulsion order requiring him to testify and granting him immunity from such matters that he would reveal.

7. Mr. Hoffman still refused to testify to questioning by the government and the Grand Jury.

8. Upon the request of the government on behalf of the Grand Jury, this court convened a hearing on the afternoon of November 18, 1986, an oral motion was made by the government to hold Hoffman in contempt and various documentation and arguments were presented at that time.

9. It was agreed by counsel for both parties that a briefing schedule would be set and a continuation of the hearing and renewed hearing would be set once again for December 17, 1986.

10. On behalf of Hoffman Charles Moses filed a motion and supporting memorandum dated November 24, 1986.

11. The government filed its brief in support of motion to hold in contempt together with a motion to hold in contempt on December 9, 1986, and on December 11, 1986, filed a Supplement to Brief in Support of Motion to Hold in Contempt.

12. That Mr. Hoffman's attorney filed a reply brief of David Mervin Hoffman on December 16, 1986.

13. This court held a hearing at 1:45 p.m. on December 17, 1986, at which time David Mervin Hoffman was present with counsel, and the government being represented.

14. David Mervin Hoffman was able to testify on his behalf.

15. This Court received various exhibits in this matter to which there was no objection by either of the parties.

16. The Court received the following documents as exhibits:

(a) Transcripts of proceedings of April 4, 1986;

(b) Transcript of procedings of May 9, 1986;
(c) Transcript of sworn testimony of David Mervin Hoffman, November 18, 1986;
(d) Copy of the Indictment;
(e) Handwritten note of Mr. Hoffman's previous attorney, Christopher Thimsen;
(f) Affidavit of Christopher P Thimsen, dated December 15, 1986;
(g) Copy of judgment and conviction;
(h) Letter from Jeffrey Thomas, Agent for the Attorney General of Canada, dated November 18, 1986;
(i) Copy of the habeus corpus ad testificadum, writ dated November 10, 1986;
(j) Copies of subpoena to testify before the Grand Jury dated November 18, 1986;
(k) Although not specifically received as evidence exhibit "D", attached to Government's Brief in Support of Motion to Hold in Contempt shall be considered by the court taking judicial notice which exhibit being an information charging David Mervin Hoffman under the name of Thomas Stanley Deane in a two count indictment dated January 13, 1986, in British Columbia, Canada.
(l) This Court's Compulsion Order, dated June 16, 1986.

Based upon the foregoing facts and consideration of the following evidence, the court makes the following conclusion:

1. Based upon United States v. Powers, 629 F.2d 619, this Court has pursuant to the motion before the powers to hold the defendant in criminal or civil contempt pursuant to section 42(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 401 and/or 28 U.S.C.

1826.

2. Based upon David Mervin Hoffman's refusal to testify before the Grand Jury and his explanation of same before this Court, through counsel and through his own testimony, there is no just cause shown why he should not comply with the grand jury subpoena to testify nor this Court's Order of Compulsion, dated June 16, 1986.

3. That all of the matters set forth for reasons for not testifying including fear of retaliation is not just cause, the claim of conflict of interest or conflict of laws or lack of Fifth Amendment rights between the United States and Canada is not just cause.

4. The government has advised this court that it will not use the grand jury transcript for the purpose of providing it to Canadian authorities for prosecution of Mr. Hoffman in Canada.

5. Based upon United States v. Baird, 668 F.2d 432 (8th Cir.) cert. denied, 102 U.S. 2255 (1982), that Hoffman has expressed no rights or concerns within the framework of the grand jury testimony, compelled testimony or contempt case law that is appropriate.

APPENDIX B

6. The grand jury investigation, without knowing the full contents herein, is in fact reasonable under the facts and circumstances set forth although this court has sketchy knowledge at the time of hearing.

7. That the plea bargain agreement of Hoffman, set forth entirely upon the record, indicates that he was aware that any bargain reached between his counsel and the government was not binding upon the court.

8. The record indicates and counsel so stated that adequate briefing time, time for presentation of evidence and other matters to be presented to court prior to ruling have been adequate.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. That David Mervin Hoffman is found in contempt pursuant to Motion herein;

2. That David Mervin Hoffman shall be placed in the Cascade County Jail or such other suitable facility by the United States Marshal until such time as he can appear before the Great Falls Grand jury and give truthful testimony and answer such questions as may be propounded of him pursuant to such investigation;

3. In the event that David Mervin Hoffman fur-

ther refuses to testify at the next seating of the Grand Jury, he shall remain in the Cascade County Jail until such time that he will testify or until further order of this Court.

4. Any computation of time spent in custody pursuant to this order and its effect upon defendant's fifteen (15) year prison sentence shall be computated by the Bureau of Prisons.

January 26, 1987.

Paul G. Hatfield
UNITED STATES DISTRICT JUDGE

APPENDIX B

JAMES E. SEYKORA
Assistant U.S. Attorney
P. O. Box 1478
Billings, MT 59103
Telephone (406) 657-6101

FILED
Jan 22, 1986
Lou Aleksich, Clerk
By Judy A. Bishop
Deputy Clerk

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA)	
Plaintiff,	) CR 85-1-BLG-JFB
vs.	) 21 U.S.C. 841(a)(1), and 841(b)(B)
THOMAS DEANE,	) (15 yrs and/or
	) $125,000 fine)
Defendant	) special parole term: 3 years

INDICTMENT

THE GRAND JURY CHARGES:

That on or about the 16th day of January, 1986, in and/or near Billings, in the State and District of Montana, THOMAS DEANE, knowingly and intentionally did unlawfully possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. Section 841(a)(1).

A TRUE BILL.

Donn M. Bruggeman
FOREPERSON

BYRON H. DUNBAR
United States Attorney
District of Montana

APPENDIX C

(Handwritten note of Christopher P. Thimsen)

2-19-86

Seykora called - If Deane pleads guilty - No recommendation re sentence - but any time will be concurrent w/Canadian sentence.

If he wants to rat then, they may make a recommendation for less time.

C.P.T.

APPENDIX D

Charles F. Moses
MOSES LAW FIRM
P. O. Box 2533
Billings, MT 5930-2533
Telephone: (406) 248-7702
ATTORNEYS FOR DAVID MERVIN HOFFMAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

.....

IN RE: GRAND JURY PROCEEDINGS

.....

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHRISTOPHER P. THIMSEN, being first duly sworn, upon his oath, deposes and says:

1. That he is an attorney at law and duly authorized to practice in the State Courts of the State of Montana and before the Federal Courts in the District of Montana. That in such capacity, he represented Thomas Deane, also known as David Hoffman, with respect to an indictment filed January 22, 1986, in which the said defendant was charged with the possession of marijuana with intent to distribute the same. To that charge the defendant entered a plea of not guilty.

During the course of his representation of Mr. Hoffman, negotiations were conducted with the United States Attorney's office with respect to a resolution of the case without trial.

2. That on February 19, 1986, he was advised by the United States Attorney's office that if Mr. Hoffman pleads guilty there would be no recommendation with respect to the sentence, but any time imposed will be concurrent with the Canadian sentence. Your affiant was also advised that if the client wants to "rat" or testify against others, then the government may make a recommendation for less time. That the note prepared by your affiant is attached to and made a part of this affidavit.

3. That thereafter, he conferred with the defendant and explained the options that were available to him with respect to an entry of plea and was informed that Mr. Hoffman rejected any consideration to testify against others that may result in a recommendation of less time, and advised your affiant that he would accept the option of pleading guilty without recommendation as to sentence and that any time would be concurrent with

the Canadian sentence. That at the time of entry of the plea and at the time of the sentence, the defendant David Hoffman knew and understood that he was pleading guilty to the charge in the indictment without recommendation and had rejected any offer to testify as to others which might or could result in less time.

4. Your affiant further states that Mr. Hoffman made it a condition of the sentence that neither the United States Attorney nor the Court would have any objection to his being returned to Canada, since he wished to return to Canada where he is a citizen and not have any further contact with the American authorities. His understanding was incorporated in the Judgment of Conviction.

Further your affiant saith not.

DATED this 15th day of December, 1986.

s/ Christopher P. Thimsen

Subscribed and sworn to before me on this 15th day of December, 1986.

s/ Sandi Atkinson
Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires 4/10/1987

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, Billings Division
Docketing No. 86-1-BLG-JFB

Filed and Entered in
Criminal Docket
May 12, 1986
Susan L. Nybo, Deputy

United States of America vs.

DAVID MERVIN HOFFMAN a/k/a THOMAS DEANE

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government Robert L. Zimmerman, AUSA the defendant appeared in person on this date May 9, 1986

With counsel CHRISTOPHER P. THIMSEN, Esq.

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea.

FINDING AND JUDGMENT

There being a finding/verdict of **GUILTY**

Defendant has been convicted as charged of the

offense(s) of possession with intent to distribute marihuana, a Schedule I controlled substance, in violation of 21 U.S.C. Sec. 841(a)(1).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representatibe for imprisonment for a period of fifteen (15) years, with a special parole term of three (3) years, pursuant to 21 U.S.C. Sec. 841(b)(B).

SPECIAL CONDITIONS OF PROBATION

The Court has been informed defendant may seek application to serve his sentence in Canada. Neither the Court nor the. United States has any objection therein. In the event application is successful, the Court notes the terms and conditions of defendant's parole would be subject to Canadian law.

The defendant shall pay Fifty ($50.00) dollars to the

Victim's Crime Fund pursuant to the Comprehensive Crime Control Act, 18 U.S.C. Sec. 3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

s/ James F. Battin, Chief Judge,
D.Mont. May 12, 1986

of guilty unless what you tell me factually makes you guilty of a crime against the United States?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know what the maximum punishment is as provided by law for the offense with which you are charged?

THE DEFENDANT: Yes, sir.

THE COURT: What do you believe that to be?

THE DEFENDANT: Fifteen years and $125,000 fine.

THE COURT: In addition to that, there is a special three-year parole provision which would really add onto any sentence that I might impose upon you.

THE DEFENDANT: Yes, sir, I understand that.

THE COURT: And that does not then, as far as you are concerned, make any difference as to whether or not you want to enter a guilty plea?

THE DEFENDANT: No, sir.

THE COURT: What is your present age?

THE DEFENDANT: Thirty-nine, sir.

THE COURT: And has there been any plea bargaining in this case, Mr. Thimsen, with the U. S. Attorney's office?

MR. THIMSEN: Your Honor, the only plea bargain we have entered into is in exchange for the plea of guilty, the U. S. Attorney would not make any recommendation regarding sentencing, and that they will request a presentence report before commencing.

THE COURT: All right. Is that your understanding, Mr. Seykora?

MR. SEYKORA: That's correct. I think one additional matter, perhaps, in the event that Mr. Hoffman were to make application, if he were sentenced to prison in this case, to serve his time in a Canadian prison, the U. S. Attorney's office would not object to that, Mr. Hoffman going back to Canada to serve that time, Your Honor, in addition to what Mr. Thimsen has already indicated to the Court.

THE COURT: Is that your understanding, as well, Mr. Thimsen?

MR. THIMSEN: Yes, Your Honor. The understanding, or the hope is, that any time Canada would give would be concurrent with the sentence here. Of course, that would be up to them. At least that recommendation would be put on the record, or a notation of it at

least would be placed on the record.

THE COURT: Mr. Hoffman, are you a Canadian citizen?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you do understand that I am not bound by the plea bargain in any way?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, I can consider it. If I don't like what they are saying, I'm not bound to agree to what they have agreed to?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Has anybody promised you any leniency in the terms of what I might do in the event that you pleaded guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anybody made any threats against you in order to get you to plea guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you now or have you been in the immediate past under the influence of any drugs?

THE DEFENDANT: No, sir.

THE COURT: Have you had enough time to discuss

with Mr. Thimsen any possible defenses that you might have to the charge?

THE DEFENDANT: Yes, sir.

THE COURT: You have told him everything that you know about it?

THE DEFENDANT: Yes.

THE COURT: So he's prepared to advise you?

within the parameters of the court at this time, and this posture, to look at that. The record is clear as to what he understood. Now, if he's going to say the understanding was different, we are getting into an entirely different ball game.

THE COURT: I think you're probably right. I don't think he can impeach what actually occurred. It's my understanding here, that there was an offer made which he rejected but anyway, just so there is a complete record for an appeal here, I am going to overrule and you may go ahead.

MR. MOSES: Thank you.

Q. (By Mr. Moses) Would you explain what your understanding of the events were, in connection with your entry of a plea on May 9th, 1986?

A. I was told I had an option. I could testify against others and my sentence could be reduced. If I didn't want to testify against others, take my chances in court. I chose the latter and received the maximum sentence.

Q. Did you discuss this with your attorney, Mr. Thimsen?

A. Yes.

Q. Did you understand that you had those options?

A. Yes.

Q. And that you rejected, I take it, any testimony to be given against others to get less time?

A. Yes.

Q. Was that in your mind?

A. Yes.

Q. Was it your understanding that, by taking the second option, that you wouldn't have to testify against others?

A. Yes.

Q. Now with respect to the judgment of conviction, that is an exhibit in this particular case which has now been identified as the Defendant's Exhibit 4, there is some reference to, "the court nor the United States has any objection to your serving your sentence in Canada." Would you explain your understanding of that position and how it came about?

MR. SEYKORA: We would offer the same objection, calling for a conclusion of law on the part of the witness, your Honor. It's outside the scope of his

ability to answer.

THE COURT: Overruled. Go ahead.

Q. (By Mr. Moses) Would you explain that to the court?

A. To further — no hassles from the United States. And the rest of it, I have Mr. Thimsen get the judge to include on the order commitment that the United States or the court had anything more to do with me.

Q. Are you a Canadian citizen?

A. Yes, sir.

Q. Was there any objection by the judge, or the prosecutor, to you being returned to Canada?

A. No.

MR. SEYKORA: Objection. The record speaks for itself.

MR. MOSES: I'm sorry, the record does speak for itself.

Q. (By Mr. Moses) Now, there has been stated in the memorandum and the motion by the government, the request that if you are held in contempt, that that be considered as dead time. Do you resist and object to

that motion of the United States Attorney?

A. Yes, I do.

Q. Why do you do that?

A. My sentence began and can't be interrupted by a civil proceeding. Statute does not provide for exception. As my lawyer states, it isn't logical.

Q. You have discussed that with your attorney?

A. Yes, I did.

Q. And that's your position; right?

A. Yes.

Q. Finally, there has been some reference in the proceedings, and in your appearance before the Grand Jury, as to retalliation. I would like to know what your position is as to that. Can you explain to the court as to your fear of retalliation?

A. It is serious, I feel, because, once again, the effort to bring me in front of a Grand Jury has put me in severe danger, especially in a prison system, and I feel that the United States cannot protect me any longer.

MR. SEYKORA: I'm sorry, counsel, what was that response? Put you —

A. In severe danger.

Q. (By Mr. Moses) Would that be in the United States, as well as in Canada?

A. Yes, sir.

Q. You have had an opportunity, I take it, Mr. Hoffman, to go over all these matters and to discuss them with your counsel?

A. Yes, sir.

Q. You are, in some respects as to what the law is, relying on your counsel to advise you as to what you should or shouldn't do?

A. Yes.

MR. MOSES: Your Honor, I have no further questions for this witness.

THE COURT: Thank you. You may cross-examine.

MR. SEYKORA: Thank you, your Honor.

CROSS-EXAMINATION

EXAMINATION BY MR. SEYKORA:

Q. Mr. Moses asked you if you had another name besides David Hoffman, and I think you answered Thomas Deane. You had other names, too; didn't you?

THE COURT: Counsel?

MR. SEYKORA: Thank you, your Honor. Just a few moments.

Your Honor, the reason for the request for compelling testimony — Mr. Moses, at times, seems to lapse off in his brief into some great hypotheticals as to what may occur and what may not occur. We have been very forward with the court in what we wish to do and to have his testimony compelled.

Mr. Moses, apparently, is looking completely to the north and basically saying, and as he just said a few moments ago, he may have to testify in Canada again. Supposedly, the concern of Mr. Moses is that he's going to be subject to some type of criminal action, not that he just doesn't want to testify. I think those were the issues that are getting muddled a little bit with Mr. Moses.

Certainly, he may have to testify, but that doesn't subject him to any type of penalty. When the bottom line gets down to his argument, he doesn't want to snitch, or rat off on somebody else, and I can appreciate that and understand that, but that's the reason for compelling testimony there. In fact, one of the procedures that are being used currently in the court system — I just talked to another prosecutor that had seven defendants in a case. They asked to be severed. They were severed. They went to trial with a No. 1 defendant and they called the second and third defendant to testify against the first guy, compelled

no pleading or anything about the unconstitutionality of the statute, that they purportedly had the jurisdiction to hear it, and he found that he did not have jurisdiction to hear the writ of mandamus. But then as an aside, or sua sponte, said as a matter of fact — and by the way, just in case anybody is interested, the Congress didn't have the right to pass this statute that I say I now have jurisdiction under, because the constitution itself is specific on the point, they could not do it.

Anyway, my first impression was that you were probably right, but the Ninth Circuit has not held that way, and I think that I'm duty bound to follow this circuit case.

Then that brought me down to the point of the plea bargain and it's funny, as strange as this sounds, I think in the Canadian law that's cited here, their rationalization is kind of like you would think here in our use of the term. What is the work, they don't allow the prosecution because —

MR. SEYKORA: Abuse of process, your Honor.

THE COURT: Abuse of process. But in this situation, this defendant had an option, in a sense, but it was his option to either rat, if you want to use that word, and then he would get a lesser sentence. He chose not to do that, but that didn't bind and, of course, the U.S. Attorney could not bind the system, per se.

I just don't see that the plea bargain — he had an option to do that, he didn't choose to do it, so he's stuck

with what he's got.

Usually, when you get through with the due process, you're always going through that roller, and it seems the more process you use, the thinner you get by the time you're rolled out, and that probably isn't a good legal determination, but that's sometimes true.

Anyway, I feel here that that plea bargain does not apply here to what we are doing. First of all, he was given the opportunity to express, if there was anything there and, of course, by that time he had chosen not to. But somehow, in my mind, it isn't as though nobody told him. As far as I can see, if you don't take this option, then we are going to force you, or not force you; he wasn't promised that this procedure wouldn't be carried out.

Now I don't know how good a lawyer Mr. Thimsen is. I don't believe I ever met him, and maybe that has nothing to do with what we are talking about, but it might have been on his part at that point to make some sort of a record as to what we are talking about here now. I think it might have been possible, but I don't see how that arises. Just under the nature of the beast, I don't follow that logically out.

Therefore, we come down to the fact that I do find him in comtempt. I order him to testify, which brings us down to the last point and, that is, whether or not it is dead time. Are

28 U.S.C. Sec. 1826. Recalcitrant witness.

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of -

(1) the court proceeding, or

(2) the term of the grand jury, including extensions

before which such refusal to comply with the court order occurred, but in no event shall confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoevere rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

18 U.S.C. Sec. 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

APPENDIX L